

BETTER CORPORATE GOVERNANCE IN EUROPE THROUGH EMPLOYEE BOARDROOM PARTICIPATION

Background Information

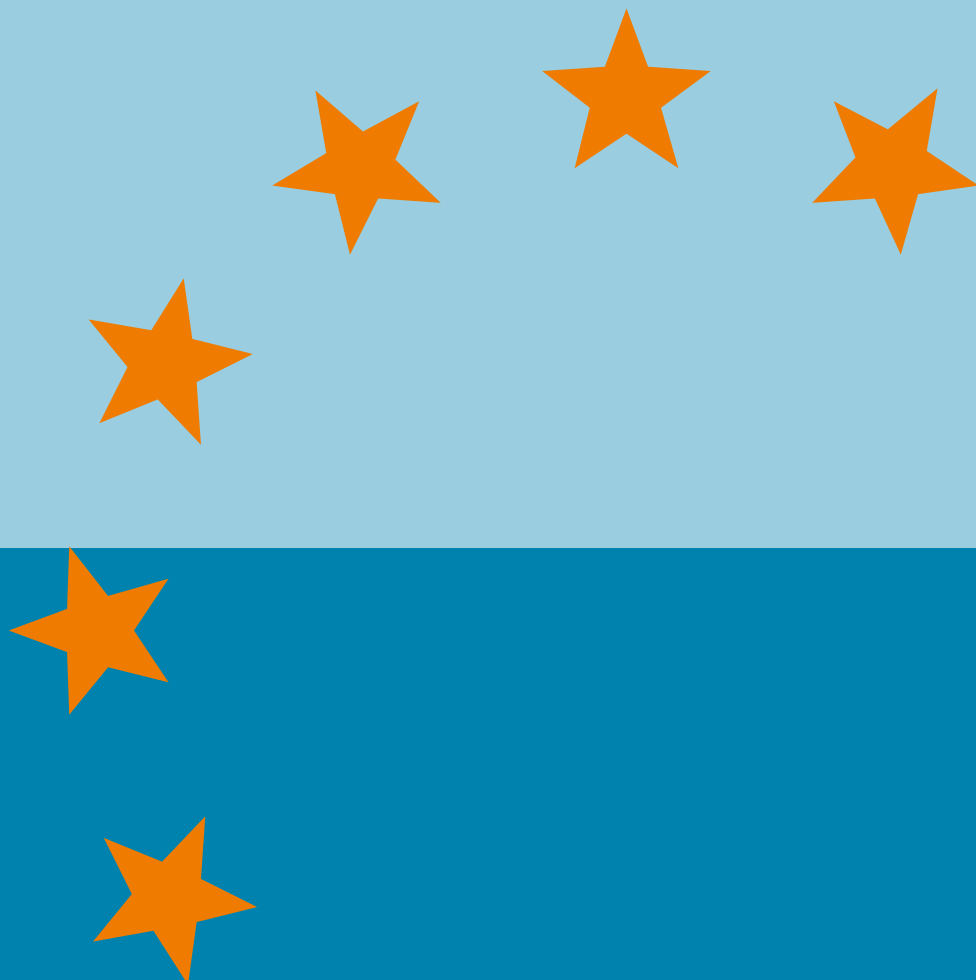


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Joint decision-making: a model that works

Employee involvement in decision-making is widespread in Europe. Even so, companies still try to avoid their obligations. European minimum standards could prevent that.

A majority of European countries have rules that guarantee employees a voice in companies' governing bodies. In 19 of the 31 countries in the European Economic Area (EEA) employee representatives have the right to be involved in decisions at board or supervisory-board level, a recent study by Aline Conchon for the European Trade Union Institute (ETUI) has found.

Employee representation at this level is so widespread that it could now be considered "a central component of the European social model", Conchon says. In contrast to what is often assumed, employee involvement in decision making ("co-determination") is not tied to a two-tier board structure where management and the supervisory board are kept separate. Employees also have a voice in countries where companies tradi-

tionally have a single governing body, such as in France, Norway and Sweden. In the vast majority of countries the rules are legally binding. In other words, a company that meets the criteria is obliged to take steps to include employee representatives in its governing body. The Nordic countries are an exception. Here an initiative from the workers or the unions in the company is needed to trigger these rights.

Not just in Germany

"There are significant variations between different European countries in the way in which worker representation with decision-making power operates at board-level," Conchon says. Nevertheless it is possible to distinguish three clear groups:

► 13 countries have wide ranging rights to employee involvement in decision-making in both the public and the private sectors, that is in state-owned, quoted and limited companies. These are Austria, Croatia, Denmark, Finland, France, Germany, Hungary, Luxembourg, the Netherlands, Norway, Slovakia, Slovenia and Sweden.

► In six countries the right to board-level representation is limited to state-owned companies. This is the case for the Czech Republic, Greece, Ireland, Poland, Portugal and Spain. In Poland there is also employee participation in former state-owned companies.

► 12 countries have almost no employee involvement at this level: Belgium, Bulgaria, Cyprus, Estonia, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Romania and the UK.

The rules in the individual countries are not static, but constantly change, Conchon says. In particular, the financial crisis, whose effects continue to be felt, could still produce further changes, both posi-

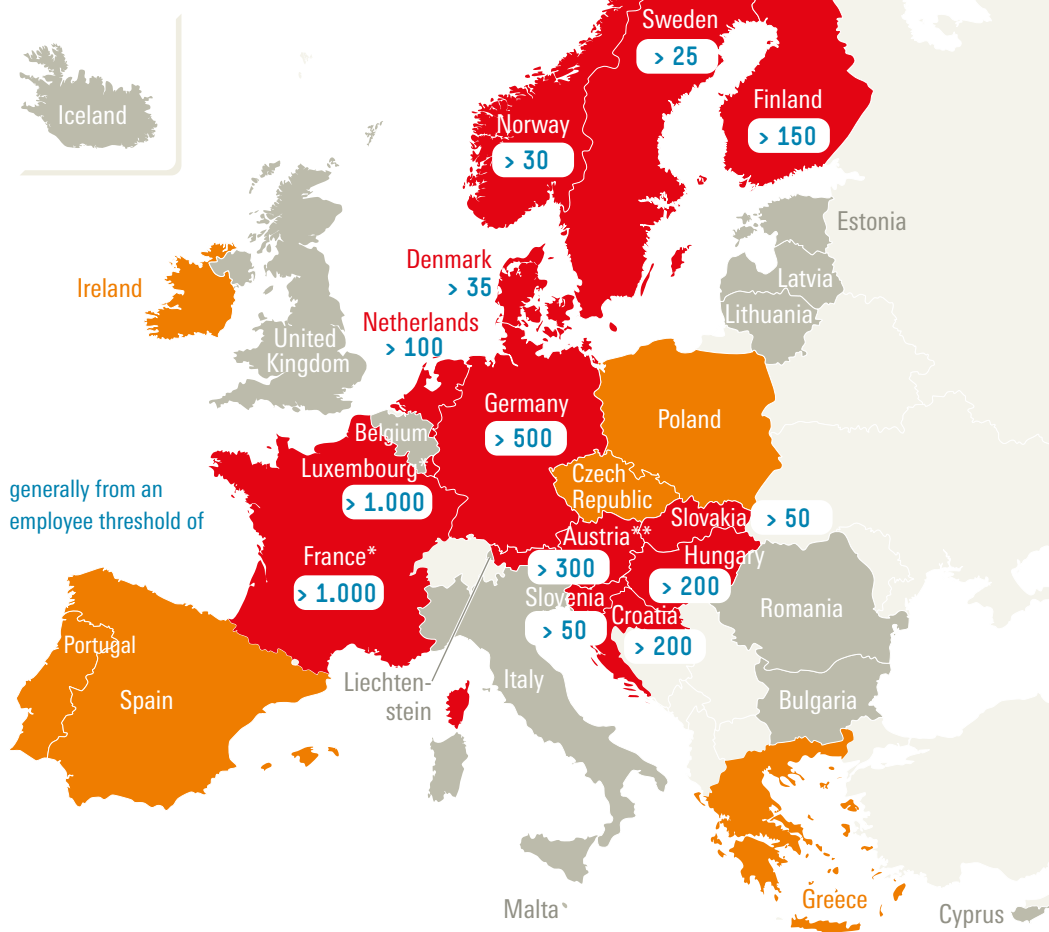
Where employees are involved in decision-making

There is a right to employee representation in governing bodies ...

in state-owned and private companies

mainly in state-owned companies

only in exceptional cases



* not apply to state-owned companies

** only limited companies, at AGs no threshold unless a work council exists; Quelle: ETUI 2015

tive and negative. “In the current turbulent times, encouraging greater provision of information, and strengthened consultation and representation of workers in corporate governance could therefore be an important means to enable companies to survive and thrive”, Conchon says. She points to evidence that countries in Europe with more extensive rights to employee board-level representation, such as Germany, have performed significantly better economically than those with relatively few rights. The fact that Germany came through the crisis particularly well is partly a consequence of the German system of employee participation at board level. Both the European Parliament and the European Commission have recognised that employee involvement can help to avoid crises.

Despite this, employee board-level participation has been weakened precisely in those states which have been hardest hit by the crisis. In Ireland, Greece and Spain, especially, many previously state-owned companies have been privatised under pressure from the International Monetary Fund, the European Commission and the European Central Bank. This privatisation has effectively ended employee participation in these companies as, in these countries, employee representation at board level only exists in state-owned companies. In addition, national legislators have sometimes restricted employee representation rights, as in the Czech Republic. In 2012, the Czech parliament passed new company legislation which abolished previously obligatory employee board-level representation in private companies.

Legal form obstructs co-determination

Conchon believes that there are also threats at European level with a “regulatory competition” becoming apparent. Companies are able to “shop around among the various national regulatory and legal frameworks” and finally choose the one with the weakest rules, allowing them to escape the requirement to have employee representation at board level. Com-

panies can have their registered office in a country “free of employee representation”, for example setting up as a British limited company or PLC. Data from the Hans Böckler Foundation indicates that there are already 94 German companies making use of a foreign legal form, operating for example under the name of “Ltd & Co KG”. A loophole in German legislation means these firms no longer have employee representation on their supervisory boards.

The planned “single person company” (Societas Unius Personae, SUP) could further accelerate the escape from employee representation. The European Commission wants to introduce the one-person company to create a European legal form that can also be used by small and medium enterprises. The formation of subsidiaries abroad is also to be made simpler. These moves by the EU are making it easier “to set up letter-box companies” says Conchon. This allows companies, under an apparently reputable pretext, to split the registered head office of the company from its actual place of operations and choose which national company law they fall under.

However, there are demands from politicians and trade unions for a strengthening of employee participation. The European Trade Union Confederation has proposed that rights for employee board-level representation should apply to all companies taking a European legal form as opposed to a national one. An EU directive would ensure a minimum standard, allowing national board-level rights going beyond this minimum to remain unaffected. <



FURTHER READING

Jeremy Waddington, Aline Conchon Board Level Employee Representation in Europe: Priorities, Power and Articulation, New York, 2016

Source: Aline Conchon: Workers’ voice in corporate governance: A European perspective ETUI/TUC, 2015

“Europe needs the voice of labour”

The European Court of Justice (ECJ) has to decide whether the German system of employee board-level representation is compatible with EU law. A shareholder of the travel company TUI has brought an action to challenge the German rules on the choice of supervisory board members. Norbert Kluge, an expert in the area, explains that Europeanisation and board-level representation go together well.

Those bringing the case argue, among other things, that employees could hesitate to take up a job in foreign subsidiary because they would then lose their right to be elected onto, or to elect, the supervisory board. This sounds a pretty artificial argument. What really lies behind the case?

We need to be clear. The plaintiffs are not interested in making the German system of employee board-level representation (“co-determination”) more legitimate. Their aim is to get rid of it. And they would not be at all unhappy if this were to have consequences for employee rights in other European countries – the 18 of the 28 EU states plus Norway where the employees’ right to be represented on supervisory or unitary boards is part of the basic legal structure. The action is the umpteenth attempt by the opponents of co-determination to use Europe as a lever to eliminate workers’ rights in Germany. This may come as a surprise, but despite the often repeated praise for co-determination from business circles, parts of the economic elite and their legal supporters in Germany have never come to terms with employee representation at board level.

EU member states can express a view to the ECJ. What positions have they taken up?

The German government has presented its view to the ECJ. Based on its previous statements – that co-determination is a fully protected legal right – it considers the claim to be unfounded. We also know that Austria has submitted a statement to the court along similar lines. It supports the position that national regulations, like the German co-determination legislation, do not obstruct the free movement of labour or contradict the ban on discrimination.

Are there other influential forces that employees can look to in defence of their co-determination rights?

There are the unions, under the umbrella of the European Trade Union Confederation. And there are members of the European Parliament who are convinced of the benefits of co-determination and want to regulate for socially responsible and better corporate governance, with a legally stronger “workers’ voice”.

What concrete measures would strengthen co-determination in Europe?

In October 2014, European unions unanimously passed a resolution calling for a new integrated architecture for employee involvement at European level. Their demands are for an EU directive that will set minimum standards for information, consultation and participation at company level, in all cases where European, as opposed to national, company law is being used.

However, it is important that European minimum standards are not seen as an invitation to question national co-determination rights. We need to close legislative loopholes both nationally and at European level, before such a directive is passed.

For example?

In registering a European Company, an SE, the law prescribes that there must be an agreement on the participation of employees at the transnational top of the company. But experience shows that particularly small and middle-sized German companies in practice misuse SEs to say goodbye forever to the German system of board-level representation. They switch to being a European Company just before they reach the employee thresholds that would make board-level representation obligatory under German rules. Or at the very least they freeze their current level of employee representation at a lower level than would otherwise be the case. This abuse must be stopped.

Does co-determination work in countries that operate across borders with varying national regulations?

It is apparent that employees in transnational companies are increasingly resistant to being played off against one another. This is the effect of around 20 years of practical experience with European Works Councils.

The German government considers co-determination to be a fully protected legal right. It has expressed a view to the ECJ.

To find out more about the detailed impact of employee representation on transnational companies – taking account of all the continuing national differences – we created a European expert group “Workers’ Voice in Corporate Governance” in autumn 2015. We are asking for academic and practice-based proposals, on which European-level rules for better corporate governance can be established – including powerful rights for employee participation. <

Norbert Kluge heads the department supporting co-determination in the Hans Böckler Foundation

PRESS RELEASE

09/22/2016

International Conference on Corporate Governance and Codetermination **Workers' participation in Europe: New prospects or will the ECJ drastically curtail it?**

The Brexit vote has shifted the balance in European politics. After two decades in which the European Commission has focused on moves in the direction of privatisation and deregulation the issue is now open again: which economic and social model is to be implemented in Europe: the neoliberal, Anglo-Saxon one or a continental model based on social partnership?

A key question with regard to Europe's future political and economic development – not to mention its credibility in the eyes of its citizens – will be whether workers' rights to a voice and participation will be strengthened or weakened. The experts who discussed the issue at the invitation of the Hans-Böckler-Stiftung and the Chambre des Salariés in Luxembourg were in agreement about this. The representation of employees in the management bodies of enterprises is widespread in Europe: 18 out of 28 EU member states today have statutory regulations guaranteeing employees involvement in the supervisory or administrative board of their company. For example, in Germany there is codetermination in the supervisory board. European countries with strong workers' participation also do well economically (for more detailed information see the digital press pack at the end of this press release).

'The Europe of the future cannot function without more involvement by society. And fair, binding involvement of employees is a crucial condition of this because it goes deep into vital daily issues. For this reason our country, too, has the relevant regulations', said Luxembourg's Minister of Labour, Employment and Social Economy Dr. Nicolas Schmit at the conference. 'We trade unions want secure jobs and production sites. Codetermination helps us in this. We are delighted to see that those EU member states with developed codetermination are in a better position than countries with weaker or no codetermination', explained Reiner Hoffmann, leader of the German Trade Union Confederation (DGB). 'Workers' participation is essential in its own right. It is also important to put the company on a long term and sustainable investment track and to tackle short termism in the boardroom', declared Pierre Habbard of the Trade Union Advisory Committee of the OECD.

The more autonomous and technologically challenging working conditions are the more important is workers' participation, Hoffmann emphasised. That was worked out at European level just under 20 years ago. Hoffmann referred to the closing report of an EU expert commission of

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1997: 'The workers that European companies need – namely qualified, mobile, committed and responsible workers who are in a position to adopt technological innovations and to take on board the goals of strengthening competitiveness and improving quality – cannot simply be regarded as recipients of instructions dictated by employers ... This notion of the workforce requires close, constant participation in the decision-making process at all company levels', declared former EU vice president Etienne Davignon. However, according to Hoffmann, 'the EU's implementation of this wise analysis in actual legislation is highly unsatisfactory. In particular, European company law has been far more of a headwind than a tailwind in relation to workers' participation so far.'

The experts evaluated current developments as contradictory. On one hand, even in the United Kingdom the debate has flared up again. New Prime Minister Theresa May has announced a 'bold positive vision' for her country. Part of this vision is that in future employees and customers are to be represented on the boards of British companies. The government will commence preparatory work on reform in the autumn.

European Commission president Jean-Claude Juncker would like to conserve the continental model, as his proposal for a new 'pillar of social rights' shows. And a draft report on employee representation in management bodies is currently being debated in the European Parliament's Committee for Employment and Social Affairs, with a vote scheduled for September. However, the two initiatives are not uncontroversial: opponents of extended rights in the world of work have already expressed their position. Furthermore, according to an analysis by ETUI lawyers the previous Commission proposals for the 'social pillar' are anything but viable. There is nothing in the Commission's proposals on promoting codetermination. However, it is the declared aim of the European treaties to support the EU member states in realising social policy goals. That expressly includes codetermination.

At the same time, Prof. Dr Johann Mulder of the law faculty of Oslo University has shown that, throughout Europe, workers' participation is in grave danger from another direction. At the moment there is a case pending at the European Court of Justice (ECJ) in which a small shareholder of the travel firm TUI is disputing whether German codetermination is in conformity with European law. The plaintiff argues that employees of German companies abroad are discriminated against because they do not have a say in elections of employee representatives for the supervisory board. German courts have always rejected similar cases in the past.

'We strongly assume: The small TUI AG shareholder is not interested in improving codetermination rights; he wants to abolish them', said DGB leader Reiner Hoffmann. Many lawyers, including Göttingen professor of labour law Dr. Rüdiger Krause, consider the legal argument to be contrived. After all, the workforces of foreign companies and subsidiaries do not have a vote simply because Germany cannot interfere with the

prevailing rights in other countries or prescribe rules on supervisory board elections. It is completely normal that certain legal entitlements change if employees move to a workplace abroad, for example, in relation to employment protection (for more detailed information see press pack). No one imagines that French strike law should apply to the German establishments of French companies. 'Essential in EU law is that legislation on worker influence is subject to the national legislator', underlined Prof. Dr. Mulder in Luxembourg. 'It can therefore not be considered as discrimination applying national law on a home state employee or employer regardless of his or her nationality but not on an employee or employer outside the country's borders.'

But even though there are good legal arguments against the case, the process remains open and, emphasised the experts in Luxembourg, the potential consequences are extremely far-reaching. While the German and Austrian governments have argued against the legal action before the court European Commission lawyers have adopted a number of the plaintiff's arguments in a position statement. If the plaintiff were to prevail there would be legal consequences with regard to interference in national workers' rights beyond Germany, warned Dr Norbert Kluge, the Hans-Böckler-Stiftung's codetermination expert. This would drastically weaken the regulations for workers' participation in other countries as well. Luxembourg would also be affected. This would mean a major step back in terms of building a Social Europe. That is no way to convey Europe to the public or employees in particular, said Luxembourg's Minister of Labour Schmit.

'It is not acceptable that European jurisprudence puts a well functioning national codetermination structure in Germany under pressure, while at the same time the European institutions do not have anything to offer by way of a fair, legally robust workers' participation at European level', said Peter Scherrer, deputy general secretary of the ETUC. The European trade unions pointed the way two years ago. Their proposal was by to ensure means of an EU directive a legal minimum standard for binding workers' participation in SEs. This would be without prejudice to more far-reaching national regulations on workers' participation. In other words, there would be a dependable floor with no risk of a race to the bottom.



DIGITAL PRESS PACK

Employee involvement in decision-making is widespread in Europe. Even so, companies still try to avoid their obligations. European minimum standards could prevent that.

Condensed story:

<http://media.boeckler.de/Sites/A/Online-Archiv/19731>

Deeper analysis (European Trade Union Institute, available in French and German): <https://www.etui.org/Publications2/Reports/Workers-voice-in-corporate-governance.-A-European-perspective>

The European Court of Justice (ECJ) has to decide whether the German system of employee board level representation is compatible with EU law. A shareholder of the travel company TUI has brought an action to challenge the German rules on the election of members to the supervisory board. Norbert Kluge, an expert in the area, explains that Europeanisation and board level representation go together well.

Condensed story:

<http://media.boeckler.de/Sites/A/Online-Archiv/19729>

Deeper analysis:

http://www.boeckler.de/pdf/p_mbf_report_2016_23e.pdf

PRESS RELEASE

01/19/2017

New Legal Opinion

Workers' participation in administrative and supervisory boards: no conflict with European law

Does company-level codetermination violate European law? The European Court of Justice will soon rule on this. A new legal report considers that the plaintiff's arguments do not hold water.

German codetermination cannot be frustrated by European law. This is the conclusion reached by Prof. Dr. Johann Mulder, jurist at the University of Oslo. His report refers to a case currently being reviewed by the European Court of Justice (ECJ). A small shareholder in the travel company TUI has filed a law suit claiming that workers' participation in the supervisory board violates the fundamental principle of freedom of movement for workers. His argument is that a German employee with a seat on the supervisory board could not switch jobs to an affiliate of his or her employer without losing his or her mandate. This is alleged to mean that the said employee is restricted in his or her choice of workplace. Furthermore, foreign employees of German companies are discriminated against because they cannot vote in the election to the supervisory board and cannot stand for election.

According to Mulder's analysis these arguments are not valid. The fact that certain legal rights change if employees switch to an establishment in another country is perfectly lawful and normal. As the jurist puts it in the expert opinion commissioned from him by the Hans-Böckler-Stiftung: 'It cannot be regarded as discrimination if an employee who moves abroad no longer comes under the jurisdiction of his or her home country'.

Because hitherto there has been no European legislation on workers' participation in the supervisory board the relevant national law shall apply – and in particular to all employees within a country regardless of their origin. That means that those who work for a company subject to codetermination in Germany benefit from German codetermination. German codetermination holds, however, only where German law applies – it ends at the national borders. As a matter of fact, that is nothing out of the ordinary: employment protection or the right to strike are governed by the law of the country in which the worker is employed, not in accordance with his or her origin. As the Oslo jurist stresses, any other regulation would violate the sovereignty of the foreign legislator. Mulder's analysis is

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in line with the assessment of reputed German jurists, such as law professors Rüdiger Krause and Manfred Weiss.

The small shareholder has popped up repeatedly in recent years, filing similar suits in relation to other companies, the upshot of which would be the abolition of codetermination. Hitherto he has had no success before German courts. Now, however, the case is before the ECJ and the outcome remains uncertain. The first hearing will take place on 24 January. While the German and Austrian governments argue against the plaintiff, jurists for the European Commission have taken up his arguments. If the court finds in his favour, Mulder warns that workers' rights would be endangered not only in Germany, but across Europe. There are statutory regulations in 17 other EU member states that guarantee workers' participation in administrative or supervisory boards (see also the background information in our digital map, below left).

Professor Mulder also emphasises that the fact that to date there has been no EU legislation on company codetermination does not mean that there won't be any in the future. The EU could come up with regulations at some point. The European trade unions reached agreement on a proposal to that effect two years ago: by means of an EU directive a minimum standard could serve as a floor for binding workers' participation in European companies (SEs). This would be without prejudice to more far-reaching national regulations.

*Bernard Johann Mulder: **The law concerning the election of employees' representatives in company bodies**, Report in light of the CJEU case Konrad Erzberger v TUI AG, C 566/15, Mitbestimmungsförderung in der Hans-Böckler-Stiftung, January 2017.



http://www.boeckler.de/pdf/p_mbf_report_2017_29.pdf

Participation makes companies more ethical

The extent to which companies assume social responsibility depends in part on the institutional context. Employee participation in decision-making has a positive impact.

Among civilised people, behaving in a responsibly minded way is taken for granted. However, when companies voluntarily take account of the environment or society, this is normally worth a lengthy reference in the annual report under the heading of “corporate responsibility” (CR). Gregory Jackson and Julia Bartosch from the Freie Universität (Free University) Berlin have examined how widespread such activities are internationally and which factors may make them more common. Their analysis shows that CR is not an appropriate replacement for government regulation, but is at best a complement to it. Countries with a certain degree of “institutionalised solidarity”, indicated for example through the existence of an effective welfare state and joint decision-making rights (“co-determination”) for employees, come out better in terms of CR than countries which rely primarily on the market.

In their study, Jackson and Bartosch looked at data for the largest quoted companies in 24 OECD states in the period 2008 to 2014. To create a measure for the degree of social responsibility companies assumed by the companies, they constructed a CR-index which took account of a company’s involvement in the areas of community, diversity, job quality, health and safety, human rights, product safety and initial and further training. The index ran from 0 to 100, with the score dependent on how close the CR activity came to a possible maximum. In addition, a “Corporate Irresponsibility” index was created to measure irresponsible business practices, with information drawn from reports in the press and from non-governmental organisations (NGOs).

On the basis of this analysis, the world’s biggest companies have made considerable ethical progress. On average, the CR-index has gone up from a score of 41 to 49 between 2008 and 2013. The countries in the forefront of this change are France, the UK and Spain. German companies, with an average score of 55, are in the upper third. In terms of “irresponsible” behaviour, the USA, New Zealand and Australia have the worst results. German and UK companies, which do pretty well on the CR rankings, also, however, stand out as having a relatively large number of disreputable practices. Swe-

den and France are exemplary in both areas – a high CR-index score and not much irresponsibility.

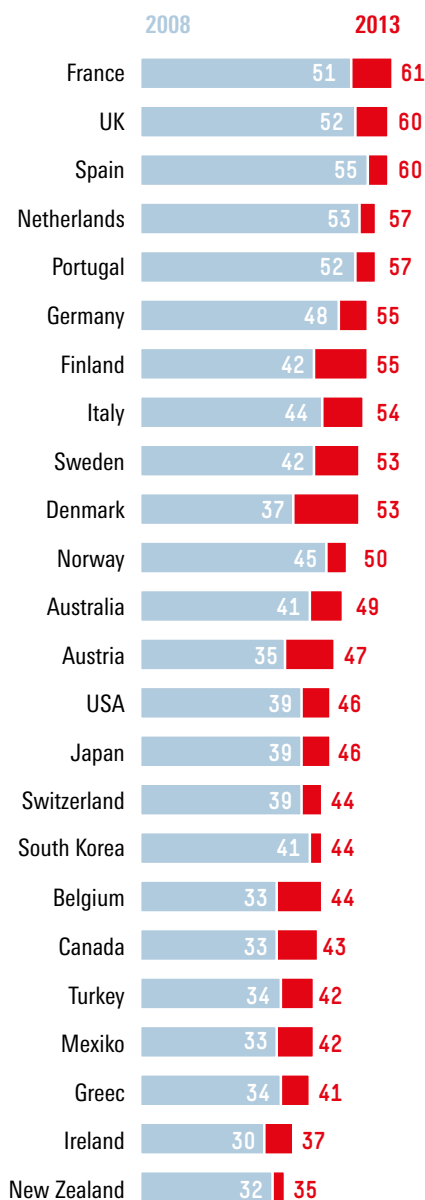
To establish the reasons for these differences, the researchers examined the relationship between their results and the social, political and legal framework in the countries examined. According to their calculations, corporate governance plays an important role. There is an association between being ob-

liged to reveal CR-related issues and taking them up more actively. Employee participation in decision-making in the supervisory board also has a significant positive effect, with the impact greatest in the areas of human rights and diversity. It appears that employee representatives push for equality of opportunity if the institutional structure that makes this possible. Competition control tends to be detrimental to CR, while state spending for social purposes is conducive to it. The researchers show that industrial relations have a consistent impact on CR scores: protection against dismissal, strong unions, works councils and a high level of collective bargaining coverage are positive factors.

Looking at the links with irresponsible business practices, it becomes clear that a highly developed stock market, little regulation, low taxes and low social spending favour behaviour which is socially damaging. Liberal regulation mechanisms, such as the obligation to reveal information, that rely on voluntary adherence can certainly lead to more CR, as the UK example shows. However, the typical liberal approach also goes hand in hand with more irresponsibility. In these cases, CR serves to divert attention from company misconduct, Jackson and Bartosch argue. According to their analysis, institutional elements like dismissal protection and works councils contribute to avoiding misconduct of this sort. It therefore seems less than sensible to wish to advance CR through deregulation. Instead what is needed is a certain degree of coordination to simultaneously promote what is right and prevent what is wrong. <

Social progress

Large companies’ Corporate Responsibility (CR) scores on a scale of 0 to 100 ...



Source: Jackson, Bartosch 2016

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Source: Gregory Jackson, Julia Bartosch: Corporate Responsibility in Different Varieties of Capitalism: Exploring the Role of National Institutions, Bertelsmann-Stiftung, June 2016

Employee participation means more training

Companies with employee representation at board level play a bigger role in the German dual-training system than those where this is not the case, an analysis using the new co-determination index MB-ix shows.

How does employee participation at board level ("co-determination") affect working conditions, job and plant security, the impact on the environment ... in a word, the sustainability of business policy?

This question could be best answered through a comparison of companies which are the same size, produce the same products, and only differ in a single respect – whether they have employee representatives on the supervisory board. Unfortunately, matching companies like this do not exist – if only because employee participation becomes legally obligatory above set employee thresholds. So to overcome this problem and reach some conclusions on the impact of co-determination, researchers at the WZB Berlin Social Science Center together with the Hans Böckler Foundation have constructed a co-determination index. This captures the degree to which co-determination is established in each company, making it possible to distinguish between companies with more and less co-determination. This can then be used, for example, in comparing their economic or social performance.

This indicator, MB-ix, does not simply provide information on whether a company has employee representatives on the supervisory board. It also takes account of their number in relation to all board members, the composition of board committees and whether the deputy chair of the supervisory board comes from the employee side. The calculation of the index value also includes whether employees in operations outside Germany can represent their interests through a European Works Council or an SE Works Council. The legal form of the company is also considered, as this determines the powers of the supervisory board and, among other things, whether the employee side can count on the support of external trade union representatives. Finally, the index also takes account of whether there is an independent personnel department whose head has equal rights to other members of the management board. This is significant in terms of workers' interests as, under the 1976 legislation on co-determination, this is the labour director, whose appointment is normally made with the consent of the employee side.

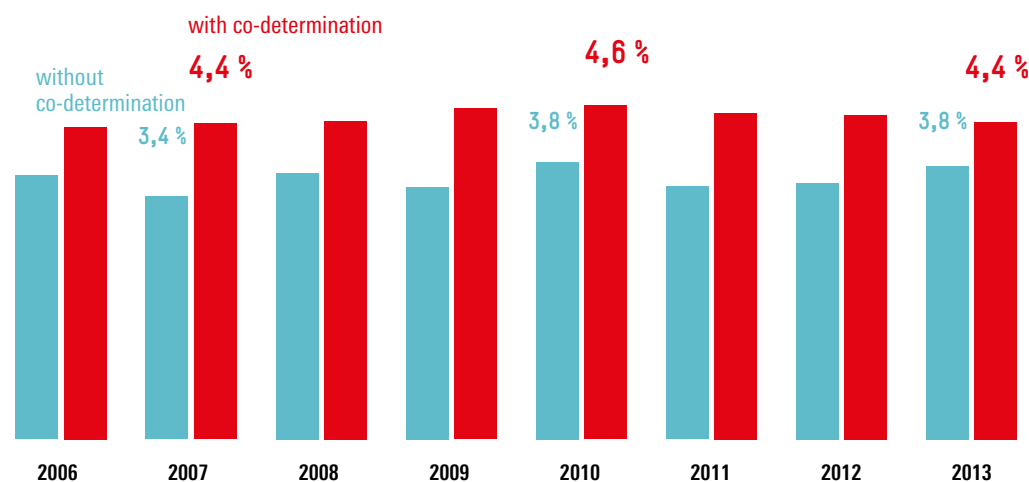
The MB-ix value for each company depends on how it scores on the various components of the index. So far, two researchers from the WZB Berlin Social Science Center, Sigurt

Vitols and Robert Scholz have calculated values for all the companies listed in Germany's main stock market indices (Dax, M-Dax, S-Dax and Tec-Dax) for the years 2006 to 2013. The dataset contains a further 50 quoted companies whose supervisory boards are split 50:50 between employee and shareholder representatives. In terms of its shape, the MB-ix contains the whole spectrum. There are companies that have the maximum score of 100, but there also others which score zero in the area of employee participation.

In the first practical use of this new measuring tool, the researchers have concentrated on companies at the bottom of the scale. The research shows that companies scoring zero on co-determination have a smaller share of initial trainees in the German dual system than those where co-determination

Employees' side pushes for training

Trainees as a percentage of total employment in companies ...



81 quoted companies in 2015; Source: Scholz, Vitols 2016

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is present. In contrast to co-determination, factors such as company size or industry have no statistically measurable effect on the proportion trained. Examined over time, Vitols and Scholz see an even clearer relationship between co-determination and managing companies in a sustainable way. During the financial crisis the average percentage of trainees in companies with co-determination was "consistently higher and showed greater continuity" than in companies with no employee participation. <

Source: Sigurt Vitols, Robert Scholz: Verankerung der Mitbestimmung und das Ausbildungsverhalten von börsennotierten Konzernen (unpublished); Vitols, Scholz: Der Mitbestimmungsindex MB-ix, Mitbestimmungsreport der Hans-Böckler-Stiftung No. 22, May 2016

'Nothing has been decided yet.'

The European Commission has expressed a positive view of codetermination in the supervisory board. However, that does not mean that the European Court of Justice has to go along with it.

The European Court of Justice (ECJ) must soon decide whether enterprise codetermination in Germany is in conformity with European law. According to the European Commission: 'the current German provisions can be considered to be compatible with EU law'. The legal representatives of Germany, Austria, France, the Netherlands and Luxembourg supported Germany's codetermination law at an ECJ hearing at the end of January. Codetermination expert Norbert Kluge of the Hans-Böckler-Stiftung explains why nevertheless the outcome of the proceedings remains open.

The Commission endorses codetermination. Is that a good sign?

The European Commission has made it clear that it expressly recognises workers' codetermination as an important political goal. From that it derives the right of EU member states to protect codetermination rights in the manner they are laid down in the national context. So far, so good. However, that does not reassure me. It would not have escaped anyone who attended the latest hearing before the ECJ that the Commission's statements were not as clearly positive as the press release suggests. Nothing has been decided yet.

In that case, what could happen?

Occasionally one hears 'Just do it like they do in Denmark'. On that basis, workers abroad, too, could participate in board elections in the home country, but only to a very limited extent as workers in dependent establishments of Danish companies abroad. The Advocate General, whose final opinion is crucial, has taken a keen interest in whether Danish regulations can be transposed.

Wouldn't it be possible to live with the Danish solution?

The Danish approach to workers' participation differs sharply from German codetermination. It only makes sense in the domestic context – as do the differences in codetermination regulations in the 18 EU member states with codetermination rights. From a workers' standpoint we don't have to assess regulations from other EU member states, nor do we want to. However, it is evident that it is not being considered as a European solution here.

Why can't the Danish solution be incorporated in German codetermination?

In Denmark company managements are legally responsible for the implementation of the elections of workers' represen-

tatives to the administrative board – at least in companies with 35 employees or more.

In contrast to that, in Germany the employees themselves organise the elections of their representatives to the codetermination-based supervisory board, independently of the management.

Why is it so important who organises the elections?

Codetermination in Germany is based on the normative idea that a company's board of directors shall be supervised by the supervisory board also from a social policy perspective. That has a lot to do with the values of democracy and transparency in the social market economy. The workers' representation on the supervisory boards of large companies is established on an independent basis for that very reason, thereby ensuring the legitimacy of the workers' representatives. This basic principle, embedded in the law, is reflected in the election



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Norbert Kluge, Expert for Codetermination

regulations. And the German legislator cannot simply extend these abroad. Conversely, Danish regulations cannot simply be transplanted into German law.

Just one more basic question. The initiator of the proceedings, a bank manager, who, according to media reports, has a modest shareholding in TUI, has repeatedly declared that he doesn't want codetermination to be abolished, but to be Europeanised.

Do you believe that?

In his written pleading it is clearly stated that he wants workers' representatives to be removed from supervisory boards. This inconsistency emerged at the hearing; the counsel for Luxembourg addressed it explicitly. What the plaintiff wants is to abolish the national right to codetermination via a European route. <

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